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No. 84-765

Supreme Court, U.S.

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ALEXANDER I. STEVAS

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

EVELYN HILLIER, Individually and as Administratrix of
the Estate of HENRY HILLIER, Deceased,

Petitioners,

vs.

SOUTHERN TOWING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to The United States Court of Appeals
for the Seventh Circuit

**BRIEF OF RESPONDENT
MEMPHIS TOWING COMPANY
IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

Was the U.S. Court of Appeals for the Seventh Circuit correct in holding that prejudgment interest should be added only to those elements of damage which had matured prior to trial, and not to the present value, at trial, of future damage items (such as future loss of support, society and services) which had not yet been sustained by the decedent's beneficiaries as of the date of judgment?

LIST OF PARTIES

The parties to the proceeding whose judgment is sought to be reviewed are:

Plaintiff - EVELYN HILLIER, Individually and as
Administratrix of the Estate of Henry
Hillier, Deceased

Defendants - SOUTHERN TOWING COMPANY*
MEMPHIS TOWING COMPANY*
C.F. INDUSTRIES, INC.

* Southern Towing Company and Memphis Towing Company are affiliated corporations. Pemiscot Towing Company and Rebco Towing Company, Inc., are affiliates of Southern Towing Company and Memphis Towing Company.

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STATEMENT OF THE CASE

Petitioner filed suit individually and as administratrix of the estate of Henry Hillier, a 23-year old Coast Guard officer who died on September 27, 1979 as the result of an escape of gas from a barge he was inspecting. Liability was admitted and the sole issue at trial was the proper measure of damages to be awarded under the general maritime law for the benefit of Hillier's surviving widow, child and estate.

Petitioner's diversity suit against Respondent Southern Towing Company was tried to a jury, which sat simultaneously in an

advisory capacity to the district judge in two consolidated limitation actions which had been filed as a result of Hillier's death by Respondents Memphis Towing Company and C.F. Industries, Inc. The district judge instructed the jury to assess damages for (1) the conscious pain and suffering sustained by the decedent before he died, (2) the present value, at trial, of the past and future loss of support sustained by Hillier's beneficiaries, (3) the present value, at trial, of the past and future loss of Hillier's services sustained by his beneficiaries, and (4) a lump-sum award for the beneficiaries' loss of society with no reduction for present value. The jury returned a verdict on January 13, 1983 for \$520,000.

On April 5, 1983 the district court entered judgment in the two limitation proceedings, awarding Petitioner total damages of \$520,000, apportioned as follows: \$5,000 for decedent's conscious pain and suffering; \$35,000 for loss of support sustained between decedent's death and the date of trial and \$210,000 as the present value, at trial, of the future loss of support; \$6,583.35 for past loss of services and \$95,673 as the present value, at trial, of future lost services; and \$172,743.65 as a lump-sum award for loss of society. The district court awarded prejudgment interest on the elements of past loss of support and past loss of services, but denied Petitioner's request for prejudgment interest on all other items of damage.

On appeal, the U.S. Court of Appeals for the Seventh Circuit held that prejudgment interest may be awarded on all past losses in a maritime wrongful death claim. It therefore remanded the case to the district court to consider whether prejudgment interest should be assessed on the award for the decedent's "pain and suffering, or for past loss of society," *Hillier v. Southern Towing Co.*, 740 F.2d 583, 586 (7th Cir. 1984). However, the Seventh Circuit held the district court was correct in denying prejudgment interest on all elements of future damages:

"...the district court properly, within its discretion, refused to award prejudgment interest on the future damages

which had been discounted to present value as of the date of the trial. See *Petition of the City of New York*, 332 F.2d at 1008 (“[t]o the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate”); *Red Star Towing v. Cargo Ship “MING GIANT”*; *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp at 992; *Petition of Marina Mercante Nicaraguense*, 248 F.Supp. at 26.” *Ibid.*

Petitioner contends in her Petition for Writ of Certiorari that the Seventh Circuit should have ordered the district court to award prejudgment interest on the entire award for loss of society, including future loss of society.

ARGUMENT

Respondent Memphis Towing Company submits the Petition for Writ of Certiorari should be denied. The Seventh Circuit correctly ruled that prejudgment interest should only be assessed on past losses, not on future elements of damage.

The long-standing rule in admiralty has been to award prejudgment interest on past losses sustained by the Plaintiff prior to trial, in order to restore the Plaintiff to the same condition which would have existed had the loss not occurred. *The Baltimore*, 75 U.S. (8 Wall) 377, 385, 19 L.Ed. 463, 465 (1869); *National Airlines, Inc. v. Stiles*, 268 F.2d 400, 405 (5th Cir. 1959) *cert. den.* 361 U.S. 885, 80 S.Ct. 157 (1959). The delay from date of loss to date of judgment has no effect on losses which the Plaintiff has not yet sustained as of the date of trial. The Plaintiff is fully compensated for such future losses by awarding their present value as of the date of trial; therefore, it is neither necessary nor appropriate to add prejudgment interest to an award for future losses. *Petition of the City of New York*, 332 F.2d 1006 (2nd Cir. 1964) *cert. den.* 379 U.S. 922, 85 S.Ct. 277 (1964); *Petition of Marina Mercante Nicaraguense*, 248 F.Supp. 15, 25-26 (S.D.N.Y. 1965) *modified on other grounds*, 364 F.2d 118 (2nd Cir. 1966), *cert. den.* 385 U.S. 1005, 87 S.Ct. 710 (1967); *Nye v. A/S D/S Svendborg*, 358 F.Supp. 145, 152-54 (S.D.N.Y. 1973), *modified on other grounds*, 501 F.2d 376 (2nd Cir. 1974) (affirmed on liability and damages); *Red Star Towing & Transportation Company, Inc. v. Cargo Ship "MING GIANT"*, 563 F.Supp. 224, 226 (S.D.N.Y. 1983); *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp. 978, 992 (E.D.La. 1975); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 595 (2nd Cir. 1961); *Martin v. Jones*, 296 F.Supp. 878, 883 (E.D.La. 1968); *Hillier v. Southern Towing Co.*, 740 F.2d 583 (7th Cir. 1984).

In maritime wrongful death cases, the usual procedure is to calculate damages by first determining what losses the survivors incurred between the date of decedent's death and the date of

trial, and then adding to that figure the present value, as of the date of trial, of expected future losses. When this approach is followed, the courts have uniformly held that prejudgment interest is not to be awarded on the future items; to do so would result in the plaintiff being over-compensated. *Petition of Marina Mercante Nicaraguense, supra*; *Nye v. A/S D/S Svendborg, supra*; *Hamilton v. Canal Barge Company, Inc., supra*; *Moore-McCormack Lines, Inc. v. Richardson, supra*; *Red Star Towing & Transp. v. Cargo Ship "MING GIANT", supra*.

"The awards are to be computed on a 2-stage basis: (1) the damages to the date of decision are to be totalled without discount and increased by prejudgment interest, and (2) future damages are to be discounted to their present value." *Petition of Marina Mercante Nicaraguense, supra*, at 25-26.

Only in those cases where the survivors' entire loss is discounted back to the date of decedent's death is it proper to add prejudgment interest to the entire award, in order to compensate the Plaintiff for the loss of the money between the date of death and the date judgment is entered. For example, in *National Airlines, Inc. v. Stiles, supra*, the Court of Appeals noted that the widow's damages were calculated by the district court "as of the date of her husband's death, and interest on the amount was awarded to make her recovery complete" (emphasis added) 268 F.2d at p. 405. However, the Court went on to state that where damages are calculated by determining their present value as of the date of trial, rather than discounting them back to the date of death, "the court should not, of course, allow interest on such amount." *Ibid* at 405.

Petitioner argues, without citation of legal authority, that damages for loss of society all "accrue at the moment of death" (Petition for Writ of Certiorari, p. 4). Therefore, she contends, prejudgment interest should have been assessed on the entire award for loss of society. This argument is fallacious. Loss of

society does not all accrue at the moment of death. To the contrary, loss of society simply begins at death and thereafter is an ongoing loss which, like loss of support and services, is sustained by the decedent's beneficiaries throughout all the years they would have spent with the decedent had he continued to live. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586, 94 S.Ct. 806, 815 (1974); *Gill v. United States*, 285 F.Supp. 253, 262 (E.D. Tex. 1968) *aff'd*, 449 F.2d 765 (5th Cir. 1971); *Fox v. Pacific Southwest Airlines*, 133 Cal.App.3d 565, 570-571, 184 Cal.Rptr. 87, 89 (1982).

If the decedent and his beneficiaries are young, as in this case, they presumably would have lived together for many years had decedent not died. Under such circumstances, most of the beneficiaries' loss of society does not actually occur until long after judgment is entered.

In the present case, the district judge actually overcompensated Petitioner at trial by instructing the jury to award loss of society as a lump sum. It would have been better to instruct the jury to separate loss of society into past and future components, as they did with loss of support and loss of services, and then to reduce future lost society to its present value at trial. See *Petition of Marina Mercante Nicaraguense*, *supra*; *Nye v. A/S D/S Svendborg*, *supra*. If the award for future lost society had properly been discounted to its present trial value, this would have significantly reduced the amount of the verdict.

Having already recovered her full loss of society, with no reduction for present value, the Petitioner is certainly not entitled to an additional windfall which would result if she was now awarded prejudgment interest on that part of the loss of society which still remained a future loss as of the date judgment was entered.

Petitioner does cite cases [see e.g. *Drachenberg v. Canal Barge Co., Inc.*, 621 F.2d 760 (5th Cir. 1980); *Complaint of Metcalf*, 530 F.Supp. 446, 460-461 (S.D.Tex. 1981); *Con-*

solidated Machines, Inc. v. Protein Products Corp., 428 F.Supp. 209 (M.D. Fla. 1976)] in which prejudgment interest was added to the entire judgment in a wrongful death proceeding. However, in each of those cases the court simply awarded prejudgment interest automatically without analyzing the issue. By contrast, the cases (cited at p.5 of this Brief) which do discuss the rationale behind prejudgment interest clearly delineate between past and future losses, and uniformly hold, as did the Seventh Circuit in this case, that prejudgment interest should only be assessed on losses which occurred prior to trial.

CONCLUSION

The Seventh Circuit correctly held that prejudgment interest may be awarded on past losses, but not on future damages which are valued as of the date of trial but which have not yet been sustained when judgment is entered. The Seventh Circuit's decision is not in conflict with other federal courts of appeal or this Court, and does not involve any important question of federal law that requires review by this Court. The Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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